means of prevention is apparent. Though the assailant is a criminal, it is not the province of his intended victim to mete out punishment. His right is merely that of self-defence, and if retreat is an apparently reasonable means of exerting that right, then the sanctity of human life should be respected.

A QUESTION OF JURISPRUDENCE — While the careful demarcation of the regions of contract and tort is generally regarded as a mere scholasticism, it has in England — owing to the County Courts Act of 1846, which taxes costs differently as the action is "founded on contract or tort" — become a living issue. The essential element of contract being the *consensus*, and that of tort the universal duty to refrain from injury, the question arises in which category shall a duty to act, imposed by law, such as the carrier's obligation to receive and carry safely, be placed. Clearly it is neither a tort, a duty to refrain, nor a contract, a voluntary obligation, but an entirely different thing, a legal duty, — a relation which has found no expression in the forms of action, and must, therefore, be dealt with as either a contract or tort. In this country legal duties have been treated, generally, as torts (*Ames* v. *Ry.*, 117 Mass. 541), while in England the authorities have differed widely, some regarding cases of this character as founded on contract, others, the most recent cases, as founded on tort, "the view which prevails in all the earlier authorities, and which underlay the action of assumpsit itself" (11 L. Q. R. 214). In the two latest cases on the subject, *Taylor* v. *M., S. & L. Ry.* '95 1 Q. B. 134, 64 L. J. Q, B. 6 (commented on in 8 HARVARD LAW REVIEW, 290), and *Kelly* v. *Met. Ry.* '95, 1 Q. B. 944, the Court of Appeal has maintained the latter view and has arrived at the result that an action against a railroad company for an injury received, is, whether a contract exist or not, one founded on tort, within the meaning of the County Courts Act. In the former case, the negligence was a positive misfeasance, in the latter, a mere omission, so that a very wide field is covered by these two decisions.

If they are to stand as law, a very radical change will, probably, ensue. The case of *Alton* v. *Midland Ry. Co.* 19 C. B. N. S. 213, deciding that a master cannot recover for loss of a servant's services, caused by the negligence of a railway company, when the contract of carriage is with the servant, — a case already tottering (Pollock on Torts, 446–447), — must now be considered as overruled; and a surprisingly large number of old cases, involving important points, will probably be unable to bear examination in the light of these decisions. The effect will not be confined to the subject of jurisprudence merely, but will have a great influence throughout the whole field of substantive law. Its theoretic correctness, on the other hand, may, perhaps, be doubted. There are certainly high authorities who oppose this view (Holland, Jurisprudence, 223–224), although it seems, after all, to be the better one. A legal duty resembles a tort very much, except that one is affirmative and the other negative; while between a contract, whose very essence is a voluntary personal relation, and a legal duty, an obligation forced on a party against his will, there is little in common. Granting this, a farther problem remains, how to treat those situations in which, presupposing a previous relation founded on contract, the parties find themselves under duties imposed by law practically similar to those which they have contracted to perform, as in ordinary bailment. This is not, perhaps, to be

considered as settled by these two cases, although it is believed that a similar decision would be equally satisfactory.

INNKEEPER'S LIEN. — The recent case of *Robins & Co.* v. *Gray*, in the English Court of Appeal, according to the report in 11 *The Times*, L. R. 569, brings up an interesting point. A commercial traveller did not pay his hotel bill, and the proprietor set up a lien on certain articles in his custody, although he had known all along that they were the property of the salesman's employer. The court held that, as the innkeeper was bound to receive the articles, regardless of whose they were, he was entitled to his lien, notwithstanding his private knowledge of the ownership. Lord Esher's opinion is refreshing. Whether agreeing with his conclusion or not, all will welcome so clear and straightforward a treatment of a subject which has often been handled vaguely and unsatisfactorily.

The statement in the opinion that the decision represents what has been the undisputed law for centuries seems rather broad. The judges who decided *Broadwood* v. *Granara*, 10 Exch. 417, and *Threfall* v. *Borwick*, L. R. 7 Q. B. 711, for instance, apparently had a contrary principle in mind. And Wharton, in his book on Innkeepers, page 119, makes the unqualified assertion that the innkeeper has no lien on goods he knows are not the property of the guest. That this view has often been taken in America, too, is shown by such cases as *Cook* v. *Kane*, 13 Oreg. 482, and *Covington* v. *Newberger*, 99 N. C. 523. However, the doctrine of the case under discussion seems clearly preferable. As the innkeeper's lien is grounded, not on the credit he gives his guest on the faith of the goods, but on the extraordinary liability imposed on him by law, it seems only just that on all goods which he is bound to receive he should have his lien, whether or not he knows them to be the property of another than his guest. As to articles which he is not bound to receive, his state of knowledge or ignorance may be material, but in the ordinary case, where he has no choice, it should not be the crucial test.

DECLARATIONS OF INTENTION. — A recent Indiana case seems to indicate that the law concerning declarations of intention is not everywhere in an advanced stage of development. The case was *Wilson* v. *Smelser* (41 N. E. Rep. 76), an action for breach of contract of marriage. The court held that although the plaintiff's intention (as showing consent on her part to the contract) was material, evidence that she had told her parents she was going to be married in October was inadmissible, because not made during the performance of an act, and so not part of the *res gestæ*.

Three years ago the United States Supreme Court held that "whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party." *Insurance Co.* v. *Hillmon* (145 U. S. 285). This case has, of course, been of the greatest value in clearing up the law of a still developing subject and ridding it of the unwholesome influence of the *res gesta* doctrine. It would seem however — if one may judge from the recent decision in Indiana — that that doctrine still succeeds now and then in elbowing its way to the front and involving a stray case in confusion.